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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

DAVID L. HALPENNY and OTA T. THOMAS,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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To the United States Court of Appeals for the Sixth Circuit

Petitioners, David L. Halpenny and Ota T. Thomas, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming the conviction of the petitioners in the United States District Court for the Eastern District of Tennessee, Southern Division.

OPINIONS BELOW

There appear in the Appendix the opinions of the United States District Court for the Eastern District of Tennessee, Southern Division overruling the petitioners' Motion for a New

Trial following their conviction (Infra. p. App. A-3) and of the United States Court of Appeals for the Sixth Circuit affirming the judgments of convictions[1] (Infra. p. App. A-8) and denying the petitioners' Petition for Rehearing (Infra. p. App. A-1).

JURISDICTION

(i) The judgment of the United States Court of Appeals for the Sixth Circuit affirming petitioners' convictions was entered July 1, 1975, but the time of its entry on that date does not appear of record.

(ii) The order denying a rehearing was entered August 8, 1975. No order has been entered granting an extension of time which to petition for certiorari, nor has such extension been sought.

(iii) This Court has jurisdiction to review the judgment by Writ of Certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Do the Thirteenth Amendment and the Due Process Clause of the Fifth Amendment permit criminal convictions and resulting imprisonment in a federal prosecution when the Government utilizes perjured evidence, part of which is established by a jury verdict on one Count of the Indictment

[1] The petitioners' separate appeals were consolidated, at their request, for both briefing and argument in the Court of Appeals. The appeals of two other appellants convicted in the same trial, James Edward Gallahan and Francina Foster Gallahan, were ordered consolidated for argument, but they were otherwise separate appeals, separately briefed, and petitioners do not consider such appellants to be parties to the proceeding on petitioners' appeal below within the meaning of Rule 21(4).

as being perjured, even though the Government adamantly insists that the testimony was not perjured, but when the Government cannct refute the rational demonstration from the record that the testimony was necessarily perjured?

2. Where a federal criminal prosecution aimed at alleged superiors for whom crimes were allegedly committed is sought to be proven solely by the testimony of the felons who committed violent and dangerous crimes, and the women who supported them therein, where such testimony was purchased by the Government's grant of immunity to those most guilty in the actual commission of the violent crimes, and where the lack of **any** external corroboration renders it necessarily true that the felons may be seeking to falsely charge the alleged superiors, who are innocent; and where the testimony **of Government witnesses** establish the existence of a motivation to frame the alleged superiors, whom the jury nevertheless found guilty—

(A) Should the intermediate Appellate Court have enunciated—or should this Honorable Court enunciate—in the exercise of federal judicial supervisory authority over federal investigative and prosecutorial officials, standards as to obligations owed by such officials in the discharge of their continuing investigative obligations, to pin-point the dates and places of alleged action by the suspects accused by such felons, to give the accused suspects an opportunity to inform the Government of any alibis they may have, and to seek to corroborate or refute such claimed alibis?

(B) When such alleged superiors actually had and introduced alibi evidence, can the Government establish its case under the requirements of the Due Process Clause of the Fifth Amendment, when it makes no effort to refute any of the several alibis presented by such suspects for the various times the Government's protected felons claimed they had guilty involvement?

3. In a federal criminal trial for conspiring to engage in dynamite bombing and related offenses, held in the city in which the Government witnesses had committed many such bombings, where the United States Attorney sought to obtain a judicial ruling admitting into evidence highly prejudicial and inadmissible testimony by presenting such testimony on *voir dire* in open court instead of seeking its admission by presenting a written summary thereof to the Court *en camera*, and where such presentation resulted in wide newspaper and television publication of such excluded and highly prejudicial evidence, where thereafter the learned District Court delayed *voir diring* the jury as to whether they had learned of such published material until after the said Court had three times cautioned the jurors about the impropriety of permitting themselves to receive any such public-media communication, and upon *voir dire* questioning addressed *en masse* to the entire panel of jurors, no juror volunteered to admit that he had been a recipient of such prejudicial information from the public news media—

(A) Did the learned District Court exceed the limited rule-making authority given it by Rule 57, Federal Rules of Criminal Procedure, in framing and announcing to the attorneys in the case a rule prohibiting attorneys from performing the investigative obligations owed to their clients in federal criminal cases by interviewing jurors unless they should first demonstrate the need and obtain the permission of the said Court therefor?

(B) Did the learned District Court err in ruling upon the defensive application to interview jurors after the trial by merely holding that the Court's limited *voir dire* examination was adequate and that no additional *voir dire* was necessary, when defense counsel asked for permission to interview the jurors rather than for *voir dire* examination?

(C) When juror dishonesty accomplished by remaining silent instead of confessing bias or other misconduct upon

massive *voir dire* examination is customarily corrected when discovered, by trial court action so as to seldom appear in reported appellate decisions, whether the learned Court of Appeals erred in refusing to pass upon petitioners' objection to the District Court's refusal to permit counsel to interview jurors, particularly when the undersigned attorneys, upon petition for rehearing, represented to the Court of Appeals that such falsification by jurors' silence had actually occurred in two cases in their experience?[2]

4.—

(A) Whether the petitioner Halpenny was properly convicted of the crime of conspiring to violate federal statutes regarding dynamite bombings, when there was no evidence of his conspiring to commit crime and when the only evidence to connect him with the established conspiracy between those who became the Government's witnesses and others, was testimony that he had paid the conspirators for committing the last bombing committed during the life of the conspiracy as alleged in the Indictment, so that all objects of the conspiracy had been achieved before the said petitioner allegedly engaged in the sole act he is charged with committing?

(B) Whether, in the proper construction of the statutes which impose criminal liability upon individuals other than the ones who actually commit substantive crimes, 18 U.S.C. §§ 371, 2, 3, and 4, credited testimony that an individual not shown to be otherwise involved has paid money after the commission of the last substantive crime which

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[2] Both of these cases went to the said Court of Appeals for review on the second trials without the record revealing the cause of the mistrial in the first trial, one being a case presently on appeal in which both the undersigned attorneys were involved and the other being a criminal income tax prosecution in which one of the undersigned attorneys was involved during his service as an Assistant United States Attorney.

was the object of a criminal conspiracy thereby becomes guilty of the crime of conspiracy under the rationale of *Grunewald v. United States*, 353 U.S. 391, and related prior decisions of this Court, when the payment for committing the substantive offense necessarily related to the substantive offense itself rather than to the offense of conspiring to commit such substantive offense?

5. Whether the conviction of the petitioners constituted a taking of their liberty without due process of law in violation of the Fifth Amendment to the Constitution by reason of a combination of errors hereinbefore indicated and:

(A) The action of the learned District Court in charging the jury that they might consider incriminating hearsay statements about the petitioners if they found such statements to have been made in furtherance of an established conspiracy, instead of the Court itself hearing such hearsay evidence *en camera* and determining whether such statements constituted acts to carry out the purposes of a conspiracy or simply prejudicial hearsay, as in *Krulewitch v. United States*, 336 U.S. 440, 442;

(B) In the action of the United States Attorney in neither seeking information as to petitioners' alibis nor offering evidence either to contradict such alibis or to prove that governmental investigation had failed to successfully prove or refute the validity of such alibis;

(C) In the United States Attorney's argument to the Jury concerning discrepancies in the testimony of governmental witnesses in which such Attorney informed the Jury on the basis of his personal knowledge outside evidence presented on trial that the Government knew of such discrepancies before beginning the trial, that "the *Government*" was stating to the Jury that the fact that such witnesses had previously lied under oath was no indication that

they always lied, and in assuring the Jury that "we are standing behind what these people said . . . and we contend what they told you was the truth . . ." and

(D) Argument by the United States implying that the petitioner Halpenny had "passed the word down to committee" to commit bombings when there was no evidence of any action or instructions given by the said petitioner other than the single act of paying for one bombing after the commission of that bombing had achieved all the objects of the conspiracy?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Fifth Amendment, Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Thirteenth Amendment, Constitution of the United States

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

18 U.S.C. § 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

[1970 United States Code, pp. 4151-2]

18 U.S.C. § 3

Accessory after the fact.

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years.

[1970 United States Code, p. 4152]

18 U.S.C. § 4

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military au-

thority under the United States, shall be fined not more than $500 or imprisoned not more than three years, or both.

[1970 United States Code, p. 4152]

18 U.S.C. § 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

[1970 United States Code, pp. 4190-91]

Rule 57(a), Federal Rules of Criminal Procedure:

Rules made by district courts for the conduct of criminal proceedings shall not be inconsistent with these rules. Copies of all rules made by a district court shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public.

[1970 United States Code, p. 4526]

Other Statutes:

This petition does not involve the construction or interpretation of any of the substantive criminal or substantive taxing statutes whose violation was charged by the Indictment to be the aim of the conspiracy, 18 U.S.C. § 844, 26 U.S.C., Chapter 53, and 26 U.S.C. §§ 5861 and 5871. These lengthy statutes are reprinted in the appendix, *infra*, pp. A-11-A-32.

STATEMENT OF THE CASE

The federal jurisdiction of the Court of first instance was based upon an Indictment returned by a Grand Jury of that Court, charging crimes against the United States, within the exclusive jurisdiction of that Court under Article III of the Constitution.

To introduce the brief summary of extensive evidence, petitioner Halpenny was a newcomer to Chattanooga, Tennessee, having been sent there to work as a business agent for a Teamsters local union while the local was under trusteeship, and having subsequently been elected President of the union. The others involved in the trial were long-time residents of Chattanooga, and at the time of the bombings, the petitioner Thomas and James E. Gallahan, also convicted were business agents in the employ of the petitioner Halpenny. Gallahan had long been friendly with government witnesses Sydney Dickson (6 Cir. App., p. 233)[3] and Rawlings (6 Cir. App., p. 197) were given jobs by Gallahan's assistance when they were released from prison for earlier convictions prior to the bombings which were involved in this case. Gallahan was the

[3] This abbreviation refers to the appendix filed in the United States Court of Appeals for the Sixth Circuit, which contains copies of the Indictment, all pleadings, and the material evidence in the case.

moving force behind a number of the bombings, which occurred in 1971, and he and his wife, both of whom were convicted, did not testify so that they were proven guilty without any substantial defensive evidence on the facts.

The overt acts charged in the Indictment mentioned only two specific bombings, both of a place where the Teamsters local union was conducting a strike, the Amos & Andy Buick Company in Chattanooga, being an abortive bombing on April 13, 1971 and the successful bombing on June 13, 1971 (6 Cir. App., pp. 11-13). However, Rawlings and Dickson committed many other bombings during, before, and after the period of the conspiracy as charged in the Indictment (April 1 through June 30, 1971; 6 Cir. App., p. 8), including bombings which were an outgrowth of Gallahan's personal animosity and bombings related to the private motivation of Rawlings or Dickson, such as the bombing of the home of a man on Rawlings' suspicion that the man had poisoned his girl friend's dog. Rawlings and Dickson were granted immunity under federal proceedings for some of these bombings and during the course of the trial, U. S. Marshals took them to a State Grand Jury where they received immunity for the rest of the bombings (6 Cir. App., pp. 337-346).

After the bombings were committed and Dickson and Rawlings sent to federal prison, the petitioner Halpenny fired Gallahan from his union job. Gallahan thereupon travelled to a federal prison in Terre Haute, Indiana to try to persuade Dickson to give testimony implicating both petitioners Halpenny and Thomas for revenge for Gallahan's having been discharged. Gallahan was seeking immunity in exchange for cooperation, and fearing that he would receive immunity, testify against them, and establish their guilt of all the other bombings, Dickson and Rawlings agreed to testify for the Government (6 Cir. App., pp. 258, 294, 59), gave their statements and subsequently testified.

The conspiracy being primarily a three-man conspiracy between Gallahan, Dickson and Rawlings, the evidence by which it was attempted to connect the petitioner Thomas consisted of testimony that he had joined Gallahan in directing the unsuccessful April 13 Amos & Any bombing and had furnished the dynamite by telling Rawlings where it was stashed (6 Cir. App., p. 29), that he had subsequently made a comment that the bomb had probably not gone off because the fuse was old and wet, and that he had paid for the first Amos & Andy bombing and another bombing briefly discussed below. It was attempted to connect petitioner Halpenny with the conspiracy by testimony that he paid for the successful Amos & Andy bombing in June, 1971. It was in relation to this bombing that the jury verdict established that the government's testimony was false and petitioners insist it was necessarily perjurious because of the detailed nature of the testimony.

The successful Amos & Andy bombing—Petitioner Thomas was hospitalized for major intestinal surgery from June 6 through June 30, 1971, as confirmed by the testimony of his surgeon (6 Cir. App., pp. 579-584), so that Thomas could not have received a telephone call at home and could not have driven to a meeting place on June 13. Both Rawlings and his girl friend Carolyn Bradford testified about a fictitious meeting with petitioner Thomas, that Rawlings had called Thomas at his home, had been directed to meet them at a donut shop, they had met Thomas there and Thomas had directed them to go on to the union hall where Petitioner Halpenny would give them money for the bombing (6 Cir. App., pp. 36-37, 348-374). They claimed that without any further telephonic communication, they went directly to the new Teamsters hall which was then under construction and not yet occupied and there they had a meeting with petitioner Halpenny and Halpenny's father where Halpenny paid Rawlings the $250 and made incriminating comment. With this being the only bombing for

which they claimed receiving money for Halpenny,[4] and with the tale of the donut shop rendezvous with Petitioner Thomas being a total fabrication, this portion of the testimony, essential to an understanding of how they could have met Petitioner Halpenny in an unfinished union hall when his place of work was the old union hall, was necessarily fabricated and perjurious. Although the witnesses admitted they would have to be mistaken about the date of the alleged payment if Thomas was hospitalized on that date (6 Cir. App., pp. 111, 373-374), they were unaware of the extreme length of his hospitalization.

The Government's only endeavor to demonstrate that this perjury might simply be mistaken testimony was that its witnesses might have been mistaken about the date (Brief, 6 Cir. Court of Appeals, p. 14). Petitioners contend this rationale is totally invalid because (1) the witnesses repeatedly testified that the payments occurred within two or three days after the bombing so that the record contradicts the theory that it could be moved to a point two weeks later, when Thomas was out of the hospital; (2) the Government witnesses testified the Teamsters hall where the rendezvous with Halpenny claimed to have occurred was still under construction at the time, and by the time Thomas got out of the hospital, the construction was completed and the new hall was fully occupied by all its personnel (6 Cir. App., pp. 594-595, 613); (3) an impossible different timing would have been no less incriminating as to the petitioner Thomas, yet the Jury found him not guilty on that Count, establishing that the meeting with Thomas in fact had not occurred.

Petitioners contend such fictitious meeting could only have been concocted to further incriminate petitioner Thomas and to furnish a believable explanation as to how the meeting could

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[4] Rawling's first sworn statement given Alcohol, Tobacco and Firearms officers stated this payment was made by Gallahan. (6 Cir. App., p. 54).

have occurred with Petitioner Halpenny in a place he had no occasion to visit except for meetings with builders or others or for casual inspection. Petitioner Halpenny's diary was introduced into evidence, but the specific day and hour of the meeting was not fixed, but there was a period on the afternoon of the second day following the bombing when Petitioner Halpenny was not involved in appointments away from his office and it was physically possible that he could have attended such a meeting.

The First Amos & Andy Bombing—Incrimination of petitioner Thomas in relation to this bombing, in addition to testimony that he and Gallahan had ordered it, consisted of testimony that he had paid for the bombing on the night that the bombing occurred and shortly after the bombing, to which he responded with the insistence that April 13, 1971 was a public election day and he was in a candidate's campaign headquarters until about two o'clock the following morning in company with numerous other people (6 Cir. App., p. 525), bringing one witness to corroborate his account (6 Cir. App., pp. 586-589), the bombing having occurred before 10 o'clock at night on April 13 (6th Cir. App., p. 204).

With the witnesses giving detailed testimony, tying the payment to this particular bombing in which the bomb did not go off, and with bombing itself being such a dangerous activity that the details might be expected to be impressed upon the memory of participants, petitioner Thomas has insisted and continues to insist that the three accounts are in irreconcilable conflict, so that they are more characteristic of fabricated testimony in which the witnesses have failed to get together on every detail instead of differences in memory.

Rawlings, who planted the bomb and claimed to have received the payment, testified that before he and Dickson got home afterward, the petitioner Thomas met them unexpectedly ("and I don't know how he came in there.") on *Lullwater Road*,

the street on which Dickson lived, and handed Rawlings the $50 without any mention of pre-arrangements or telephonic contact. Dickson testified that after the bombing, Rawlings stopped at a Greyhound bus station, made a phone call, told Dickson that petitioner Thomas would meet them at the old gun plant on *Signal Mountain Road* and that after they waited a few minutes on a lot across the street from the old Wheland Gun Plant, petitioner Thomas arrived in his automobile and made payment to Rawlings, while they were on the way home (6 Cir. App., pp. 202-205). Dickson's wife testified that the telephonic appointment occurred *after they got home* from the bombing, when Rawlings made a telephone call, he left the house alone, and returned with the $50 which he split with Dickson (6 Cir. App., pp. 500-503).

Another irreconcilable conflict which appears in her testimony is that, although it was testified that Petitioner Thomas had furnished the dynamite for the bomb, Rawlings stated over the telephone that the bomb had not gone off but that he was entitled to be paid for his materials, which demand clearly would not have been made if the materials had already been given free by Petitioner Thomas and if the phone call was actually made to and the payment made by Petitioner Thomas instead of some other individual. It is therefore the position of Petitioner Thomas that it is impossible to rationally conclude what factual findings the Jury made, if the Jury actually engaged in a true deliberative process, because any mind which reaches a conclusion as to the facts surrounding the payment must conclude that at least two versions of these facts introduced by the Government are falsehoods, and that any insistence that these three totally different and detailed accounts of all facts surrounding the supposed payments merely represent differences in memory as to unimportant details is but an insistence that the intellect must not be used in the consideration of intellectual problems. Individuals who actually live through events and recall such events in detail retain mental images of

the surrounding scene which produce agreement as to the general picture of the place of occurrence with only minor inconsistencies in details observed or remembered by some and not observed or remembered by others. Such recollections from engraved mental pictures are impossible in a case of concocted stories, and these immunized felons and their women who shared to some extent in their criminal activity have shown in this record their capacity to concoct utterly false accounts of events in the tale of the meeting with petitioner Thomas at a donut shop when Thomas was hospitalized from major abdominal surgery.

The Kenzel Bates Bombing—This must be briefly summarized to completely inform the Court of actual actions claimed to have been taken by petitioner Thomas pursuant to the conspiracy. This bombing was in a city away from Chattanooga, to which both the Government's immunized felons and their women traveled to locate and view the home to be bombed, carrying the bomb with them (6 Cir. pp., pp. 456-458). After the bombing, and while petitioner was in the hospital, Mrs. Dickson testified that she rode with her husband to the hospital to get the money and he went in and got it, but she was not permitted to testify as to hearsay statements he had made to her identifying the individual who supposedly paid him $250 for the Bates bombing (6 Cir. pp. 451, 463-465), leaving the impression, however, that petitioner Thomas paid the money.

There are highly suspicious aspects to this testimony. One is that, although the Government produced extensive testimony from Dickson, the Government did not even ask him about whether he was paid the money or about his alleged trip to the hospital to get the money. Yet his statements, which were made part of the record (Exhibits 12-14) included the statement that he did indeed go to the hospital and receive the $250 from petitioner Thomas in petitioner's hospital room, without any descriptive statements (*e.g.*, as to whether Thomas had interveinous and

cystoscopic tubes and tubes running through his nose into his stomach) from which it could be judged whether Dickson had actually been in the hospital room and seen Thomas. Another strange thing is that although Dickson stated that he received the money the day after the bombing, the date of the bombing is uncertain. In two leading questions, the United States Attorney furnished June 12, 1971 as the date of the Bates bombing in the course of two leading questions (6 Cir. App., pp. 172-220), and the bombing may well have occurred on that date.[5] However, these leading questions were concerned with the fact of the bombing and not its date, and the *only* testimony in the record as to when this bombing occurred was in the bomber's own testimony, when he responded to a non-leading question on cross-examination with the statement that he bombed the Bates home on June 6, 1971 (6 Cir. App., p. 263). If this be the correct date and if Dickson would have testified as his statement read, this would have placed the payment on June 7, 1971, which would have been impossible, because petitioner Thomas was actually undergoing major surgery or in intensive care recovering from it on that date.

During the course of the trial, the Government sought to prove on *voir dire* examination for subsequent presentation to the Jury testimony of bomber Dickson's wife that after Dickson was arrested, Gallahan brought her into contact with the attorney for the Teamsters local union, Harold Brown, Esq., and that such attorney advanced her money believed to have been obtained by a collection from members of the union (6 Cir. App., pp. 462-464). The Government contended this was admissible as proof that "the Teamster leaders were supplying money to Syd Dickson's wife while he was in prison, a thing that they would not normally do were it not for the fact that he was

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[5] The undersigned counsel have served only as appellate counsel for petitioners and have no knowledge of the actual dates of bombings.

arrested on a thing relative to the Teamster activities." (6 Cir. App., p. 468). But with the Government's admission that it could not prove the source of the money, the testimony was rejected.[6] Such rejected evidence obviously offered highly incriminating corroborative support against both these petitioners of the Government's claim that these bombings were at the command of the hierarchy of the Teamsters local union, of which petitioners were president and an important employee.

Following the course of the open-courtroom presentation of this voir dire examination, instead of presenting it to the Court in the form of a written statement from the witness, petitioners made a motion the following day for a mistrial and to be permitted to voir dire the Jury as to whether they had seen or heard the prominent newspaper, television and radio stories of this incriminating rejected testimony. The Court agreed to voir dire the Jury but between that point and the conduct of the voir dire, the Court on three separate occasions charged the jury as to the necessity of their not permitting themselves to receive any communication of news media knowledge (6th Cir. App., pp. 635, 636, Dist. Ct. transcript, pp. 581-582 and 937-938). When the Court conducted this voir dire examination of the jurors at large at the conclusion of its charge to the jury, none of the jurors volunteered to answer that they had received such prejudicial communications (6th Cir. App., pp. 794-795).

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[6] The rejecting of this evidence made it impossible for the petitioners to offer rebuttal evidence, but because the undersigned counsel believed and insisted to the Court of Appeals that the present petitioners were both innocent and framed, they felt constrained to inform the Court that they had a written communication from the said Harold Brown that he was representing Mrs. Dickson in a damage suit, that the money he gave her came from a note which she signed and he co-signed on the basis of the damage suit, that when he was unable to locate her, he had to pay the note and that no reimbursement for his loss was received from the Local Teamsters union or any other source. (Petitioners' Brief in the United States Court of Appeals for the Sixth Circuit, p. 44, n. 6).

After the jury returned its verdict of guilty, the learned District Court informed the attorney that it had a rule "against interviewing jurors in a case without first making some kind of motion or showing the necessity to . . ." conduct such interview (Dist. Ct. transcript, p. 993). Afterward, petitioners' attorney made application to be permitted to interview the jurors, representing to the Court that he felt such interviews were necessary as a result of careful and thorough indirect investigations of the jurors' background and interest, and the resulting conclusion that improper juror conduct was likely and not remote (6 Cir. App., p. 702), which permission the learned District Court refused to grant, stating its opinion that the jury should not be recalled for further voir dire (6 Cir. App., p. 812), which was not the relief sought by the petitioners.

On objections to hearsay, as on the occasion when Dickson testified that Rawlings had made a telephone call from a Greyhound bus station phone booth resulting in the subsequent meeting with the petitioner Thomas after the first Amos & Andy bombing, the learned District Court gave a brief charge on conspiracy theory, concluding with the instruction that the Jury could consider hearsay if made in furtherance of some object or purpose of the conspiracy (6 Cir. App., pp. 202-203), instead of the Court hearing and determining whether the hearsay statement furthered the purposes of the conspiracy or was simply incriminating evidence. On other occasions, the Court simply admitted incriminating hearsay testimony (e.g., 6 Cir. App., p. 206).

By its verdict, the Jury announced its decision that it accepted as true all incriminating evidence offered by the Government except for that one bit of evidence concerning the donut shop which it could not accept without branding a respected surgeon as a perjurer.

REASONS FOR GRANTING THE WRIT

Petitioners assert the writ should issue because, as pointed out below, the decision of the learned Court of Appeals includes decision—or more correctly, a refusal to enunciate any decision —on important questions in the administration of Federal criminal law which have not been, but should be, settled by this Court; has rendered a decision in conflict with the rationale of applicable decisions of this Court; and because the facts and course of proceedings in this case call for the exercise of this Court's supervisory authority to discover and enunciate standards which should govern federal trial courts and investigative and prosecutorial officials to assure the protection of innocent citizens when the power to grant immunity from criminal prosecution is utilized to obtain the testimony of guilty conspirators for use against others.

The First Question raises issues as to the use of perjured testimony in obtaining criminal convictions. It is well established that government conduct in obtaining convictions and imposing imprisonment on the basis of evidence which includes perjured testimony is a taking of liberty without due process of law, contrary to the Fifth Amendment. *Napue v. Illinois*, 360 U.S. 64, *Miller v. Pate*, 386 U.S. 1, *Alcorta v. Texas*, 355 U.S. 28, *Giglio v. United States*, 405 U.S. 150, *Communist Party of the USA v. Subversive Activities Control Board*, 351 U.S. 155, *Mesarosh v. United States*, 352 U.S. 1. While resort to the Thirteenth Amendment is unnecessary, it is nevertheless clear that that Amendment by its express language prohibits imprisonment based upon perjured evidence. The Amendment itself declares imprisonment to be involuntary servitude, and it bans all involuntary servitude in the United States with but one exception —excluding not those cases in which defendants have been convicted but only those cases in which defendants have been *duly* convicted. The cases just cited prove that a conviction cannot be a due and proper one when it is based upon perjured evidence.

It was established by *Napue*, *Miller*, *Alcorta*, and *Giglio* that convictions may not stand when the prosecuting attorney knowingly used perjured testimony. But in *Napue*, this Court quoted with approval, state decision that "*A lie is a lie*, no matter what its subject, and if it is any way relevant to the case, *the district attorney has the responsibility and the duty to correct what he knows to be false and elicit the truth*. . . ." (360 U.S., at 269-270; emphasis added.) But the Court went further in *Mesarosh* and *Communist Party of the USA* and held, in accordance with the quotation from *Napue*, that convictions based in part upon perjured testimony were constitutionally infirm even if the prosecuting officials had no knowledge that the testimony was perjured. It is the use of lies that injure a defendant, and the injury is no less when the officials who use such lies act in good faith.

In this case, the U. S. Attorney knew that he had three conflicting accounts of the circumstances of a claimed $50 payment by petitioner Thomas, had knowledge from statements that the petitioner Thomas was in the hospital on a date very near the date he was supposed to have responded to a telephone call at his home by driving to a donut shop meeting, and therefore had knowledge that some of the testimony he was to offer was false and had reason to investigate the truthfulness of other testimony. But as a prosecutor makes his decisions in solitude and without the benefit of the arguments of opposing counsel, it is not necessary to contend that the prosecutor acted in bad faith in this case. Zeal can lead one who is pursuing big game to view as trivial testimonial conflicts among his own witnesses which are irreconcilable but whose reconciliation is essential to the mental process of deciding whether an individual is guilty or innocent.

This case presents an aspect of the government use of perjured evidence not considered heretofore. In the past cases, there have been subsequent factual trials on the question of whether perjured evidence was used, appellate court concessions

that perjured testimony was used, as in *Mesarosh*, or a failure to contest assertions and demonstrations that perjured evidence was used, as in *Communist Party of the USA*. But in this case, the Government takes an entirely different approach, insisting that the testimony was not perjured, though it can come up with no means of reconciling the three irreconcilable $50 payment accounts and though it can come up with no argument to demonstrate that the perjury was truthful except in its reliance upon the Jury's exclusive fact-finding function, except in its assumption that evidence the Government offered may be altered by moving the payments forward in time, and except by disregarding the Jury's verdict that the petitioner Thomas was innocent in involvement in the fictitious donut shop meeting. This wooden persistence that courts should base their actions upon irrationalities is contrary to this Court's succinct observation that reviewing courts should review rather than being remitted to assumptions, *Kent v. United States*, 383 U.S. 541, 561.

This case does not raise questions of jury resolutions of credibility but rather, questions which demand judicial consideration of the substance of detailed testimony credited or discredited by the Jury in its verdict. Courts customarily conduct such detailed examination as the only possible means of determining whether judgments are supported by substantial evidence. Here, the purpose of such studies is entirely different —to determine whether perjury appears on the face of the record in one instance, it obviously appearing from the Jury's verdict in the other instance.

The issue presented by this question is whether, when the study of the substance of testimony leads to rational and forceful insistences that the record itself establishes the testimony to be perjured, the Government may block judicial inquiry by resort to mere assumption and to theories contrary to the record and may thereby impose involuntary servitude upon one who has not been duly convicted until he shall later be able to pursue the same issue in *habeas corpus* proceedings.

The use of perjured evidence and its nonjudicial counterparts, the Bill of Attainder and imprisonment by executive fiat, have been earmarks of totalitarian governments, seen in Nazi Germany, Fascist Italy, England during the Star Chamber period and now sadly in modern India. Such procedures have no place in the United States. When it is seriously asserted that the Government has utilized perjury to obtain a conviction of innocent men, and when this assertion is supported by rational demonstration convassing a complex record, it is respectfully insisted that the law's proper abhorrence of perjury and the conviction of the innocent places a high duty upon the reviewing judiciary to give meticulous study to the problem presented. In this case, the order which the learned Court of Appeals directed the Clerk to issue did not enunciate any rationale at all, but only announced the Court's decision (Infra, p. App. A-8), contrary to the contentions of these petitioners. It is respectfully submitted that the appellate bench and bar both of the federal government and of the government of every state would benefit from this Court's consideration of this issue, that the issue is an important one in the administration of criminal justice in the federal system, and that, if relief not be granted, these petitioners will suffer involuntary servitude for crimes of which they have been *duly* convicted.

The Second Question raises grave issues concerning the problem of immunized felons using the federal judicial system and its officers to imprison innocent people framed by them. The wide-spread use of procedures for granting immunity to criminals so that their testimony may be obtained is a new development. The concomitant delegation of authority to those in the lowest levels of the Department of Justice who are often, from necessity, young lawyers with little experience in the practice vests in them immense powers which may be unwittingly used by them to the injury of innocent, as criminals learn how to purchase freedom and immunity with cooperation. With the vast expansion of federal criminal laws which has occurred since

the economic depression of the 1930's and the standing presence of 18 U.S.C. § 371 as an invitation to gain the evidentiary advantages offered by a conspiracy prosecution, the dangers of the use of judicial processes to imprison the innocent cannot be viewed as trivial or imagined.

There can be no general criticism of the use of conspiracy prosecutions for the purpose of imprisoning one who is the moving force behind criminal activities instead of merely imprisoning the underlings whose services he command. But at the same time, no one can refute the logical proposition that when there is no external corroborative evidence, when the sole evidence comes from the testimony of conspirators—and at that, the conspirators who committed *all* the dangerous crimes which were the aim of the conspiracy—no one can know whether those conspirators are testifying truthfully or are framing others against whom they or other members of the conspiracy have developed powerful hatreds. It is clear that the prosecutor must take some approach to this problem and cannot merely pretend it does not exist. It is unreal to expect that vigorous and dedicated prosecutors, convinced that one occupying a relatively high position is actually the brains and moving force behind a horrible criminal enterprise, would themselves be able to design the best approach to the problem of protecting the suspect. It is more likely that the prosecutor would construe evidence in favor of prosecution, that his eyes would lightly ride over conflicting points and statements viewed by him, and that he would not even perceive the existence of the problem of assuring that the strong arm of governmental power not be permitted to wield the weapon of perjured evidence to prosecute the suspect who might be innocent or who might be guilty. Nothing short of a decision by this Court can furnish such guidance.

This Court has demonstrated the necessity for investigation of the defendant's side of the case in another type of prosecution which is complex and fraught with danger to the innocent, *Holland v. United States*, 348 U.S. 121, *Friedberg v. United States*, 348 U.S. 142, *Smith v. United States*, 348 U.S. 147 and *United States v. Calderon*, 348 U.S. 160, and it has also demonstrated that the criminal prosecutor owes a continuing ethical and legal duty of investigation in the development and handling of a case, *United States v. Ashe*, 413 U.S. 300. All condemn conviction and imprisonment based only upon testimony of a conspirator or accomplice, but the quality of corroboration is seldom considered. When men work together to commit heinous felonies and then work together to secure immunity from prosecution, it cannot be gainsaid that they may also work together to utilize their testimonial positions against their enemy; giving false testimony is no more drastic than murdering and this occurs constantly in underworld circles.

It is respectfully submitted that the issue of the investigative responsibilities of a prosecuting attorney in such a situation deserves this Court's study. In the absence of outside corroboration, where only co-conspirators (and their women who were not charged by the Indictment but were shown by the evidence to be co-conspirators) give testimony which is demonstrably perjured, then the individuals charged, if innocent, will usually have been in other places regardless of whether they can prove an alibi. It would require little investigative effort for a United States Attorney to cause agents to interview such suspects as these petitioners, and to solicit from them, after giving them proper advice, any information they may care to offer concerning alibi or other defenses.

The record is silent as to whether the Government gave these petitioners an opportunity to assert alibis and then investigated such alibis, but the proof presented by the Government effectively establishes that no such investigation occurred. The Government did not appear to be conscious of the fact that petitioner Thomas was in the hospital when he was claimed to have driven to the donut shop, and on the other occasion,

when petitioner Thomas testified he was at a candidate's headquarters in a hotel when he was claimed to be meeting these felons on Lullwater Road or Signal Mountain Road on the way home or meeting one of them pursuant to a telephone call after they had gotten home, it appears that investigation would have led the Government to produce some witnesses to testify that the petitioner was not in Bookie Turner's campaign headquarters that night. The record leaves room for no inference but that the Government made no investigation of defensive evidence but simply accepted as true all the evidence offered by the felons it protected. There is great need to the tutorial benefit of this Court's consideration of these issues.

If the question be not one that the Court views as sufficiently important to call for the exercise of its supervisory authority over federal officials, the question of law is nevertheless one of great importance because corroboration which consists of nothing by the testimony of other co-conspirators can hardly be considered corroboration at all, particularly when the record establishes that part of that testimony is perjured and that other parts are so in conflict that it is impossible to reach any rational conclusion as to what has been proven by it.

The Third Question involves the possibility that jurors may have seen or heard some of the massive publicity about improper evidence presented in open court. Petitioners assert that the District Court had no power to make a rule forbidding lawyers to interview jurors who have been discharged, presenting a question of importance not directly ruled upon by this Court. The Order of the Court of Appeals did not mention this issue, but that Court and others, as noted by it in *United States v. Franks,* 511 F.2d 25 (6 Cir., 1975), upheld the power of district courts to forbid post-verdict interrogation of jurors by counsel. Such a holding is contrary to the rationale of this Court's decision in *Parker v. Gladden,* 385 U.S. 363, holding it to be lacking in due process of law for

a defendant to be convicted on the basis of jury deliberations when the jury was subjected to effective and prejudicial communications.

The summary of the facts given in Mr. Justice Harlan's dissenting opinion in *Parker* demonstrates that the evidence of communications with the jurors therein was obtained by interviewing the jurors, the only possible way to obtain such evidence. With the Courts of Appeals sustaining such trial-court made rules, this question merits this Court's consideration, because this constitutional right to trial before a jury freed of improper influences can never be protected if defendants are forbidden to do the investigation necessary to determine whether the constitutional violation has occurred.

Defendants in criminal cases are entitled to the aid of their attorneys in gathering evidence, and there is no difference in principle between a rule forbidding attorneys to interview discharged jurors and a rule forbidding them to interview any government witnesses prior to trial. The question of whether a court may interfere with the performance by an attorney of the investigative duties he owes to his client is an important one and such interviews pose no danger to the administration of justice: The practice of law is an honorable profession and if any lawyer acts improperly, the remedies of disbarment and criminal prosecution are and always have been adequate. A decision sustaining this court rule and its application is in conflict with the rationale of a recent decision from another circuit that court-made rules cannot be valid when carried to the point of violating constitutional rights, there, the attorney's freedom of speech. *Chicago Council of Lawyers v. Bauer,* — F.2d —, 44 L.W. 2073 (7 Cir., Aug. 4, 1975).

The rule-making authority given to courts is legislative in nature, and if such legislation be constitutional, the rule-making authority rests with this Court, not inferior courts. Rule

57, Federal Rules of Criminal Procedure, has delegated limited rule-making authority to trial courts as necessary to govern procedures in those courts, but the investigative activities of private lawyers conducted outside the court are not judicial proceedings and are not a part of such procedures. Such activities are in the discharge of a duty an attorney owes to his client, which may or may not uncover violations of constitutional rights and which may or may not result in further judicial proceedings. The making and enunciation of such a rule in judicial proceedings have the effect of an injunction against lawyers, and contemplate their enforcement by contempt or disbarment proceedings. When trial courts engage in ever-broadened use of their claimed rule-making powers, despite the fact that the delegation of such power by statute is to this Court alone, it is needful that this Court review the extent to which such rule-making power is legitimate under Rule 57 and under the Constitution, particularly when the rule-making power is utilized in such a manner as to totally bar defendants from gaining knowledge that their constitutional rights have been violated. The guilty verdict in this case, considered in light of the impossibility of rationally demonstrating from the government's conflicting evidence on hand and its perjured evidence on the other, how the jury could possibly have arrived at such a verdict is some indication that bias may have been a contributing factor. Interviews might well have produced knowledge that one juror had commented to another outside the jury room about the illegal evidence publicized after the learned District Court suppressed it.

The rationale that the jury's decision may cast light upon the factors which led it to that decision has been applied many times in determining whether damage verdicts were excessive due to passion or prejudice. This is the same rationale that most people apply in deciding that one who claims to have been carried for a ride in a flying saucer by little green men must have been either intoxicated or demented.

The Fourth Question raises the issue of whether there was adequate evidence under proper construction of the conspiracy and related statutes to sustain the conviction of the Petitioner Halpenny, assuming that the jury verdict is adequate to convert a supposed arranged meeting into a spontaneous or accidental meeting without any evidence to support the conversion.

This question insists that the learned Court of Appeals' order affirming the convictions is contrary to past holdings by this Court, demonstrating the need for the reaffirmation of such holdings; or, if such holdings be inadequate to cover this case, that the case presents a new and important question not heretofore passed upon by this Court.

Decisions by this Court establish that a suspect's action claimed to constitute a joining of a conspiracy must occur during the active life of the conspiracy, *Direct Sales Co. v. United States*, 319 U.S. 703, *Ingram v. United States*, 360 U.S. 672, *Krulewitch v. United States*, 336 U.S. 440, and *Bollenbach v. United States*, 326 U.S. 607; see, also, *Stanley v. United States*, 245 F.2d 427 (6 Cir., 1957).

Direct Sales demonstrated that one must have participated in a conspiracy during its life and before its ends had been accomplished or abandoned in order to incur criminal liability for the act. *Ingram* established that the evidence necessary to prove that the actor had knowledge that he was in fact joining a criminal conspiracy must be clear and unequivocal to avoid "piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes." (360 U.S., at p. 680). *Krulewitch* demonstrated that the life of a conspiracy cannot be extended beyond the time of accomplishment of its purposes by mere assertions that its aims were both to commit the crime and keep secret the fact of guilt of such commission; this may not even be done by formal charges in the indictment that such concealment was one of the purposes of the conspiracy, *Grune-*

wald v. United States, 353 U.S. 391, 401-402, it not being a crime for one to conceal from the Government the fact of his own guilt of the crime. *Bollenbach* demonstrated that the mere receipt or concealment of stolen property, clearly a state crime, was inadequate to render the possessor guilty of a federal conspiracy, when the federal offense of transporting stolen property in interstate commerce had been completed and the federal law-violating object of the conspiracy achieved.

Part of the *Bollenbach* rationale was based upon related statutes and the fact that Congress had not seen fit to so define the crime of being an accessory after the fact as to include such conduct as fencing stolen property after its transportation, and that the aiding and abetting statute was an inadequate basis for imposing criminal liability when incriminating action occurred only after commission of the substantive federal crime.

The instant case presents the issue of whether mere conduct related to a crime is adequate to render one criminally liable, when analysis of the facts does not bring the conduct within the scope of the statutes.

Clearly, the commission of the substantive offense is *always* an overt act in furtherance of the conspiracy to commit that offense, and oftentimes, the payment of compensation for committing the substantive offense is an overt act within the meaning of 18 U.S.C. § 371. In an illicit business conspiracy, such as whiskey-making or drug-marketing, the payment of compensation to the illicit workers is essential to entice them to continue their illegal activities so that the conspiracy may continue to achieve its illicit objectives. But where, as here, there is not a continuing business conspiracy but at most, a conspiracy to do bombings directed by Gallahan and/or others related to the local Teamsters Union, plus conspiracies to bomb for businessmen and from personal malice, the situation and considerations are different.

The Government cannot claim that action after the conspiracy was charged to have terminated by the language of the indictment are overt acts in furtherance of the conspiracy.[7] While the conspiracy was charged to have continued until the end of June, 1971, the final criminal offense committed during the life of the conspiracy as charged was committed in the second Amos & Andy bombing on June 13, 1971. Hence, payment made afterward was an act done after the conspiracy had achieved its objective as shown by the evidence. Payment cannot rationally be maintained to have been made for any purpose other than to compensate the immunized felon for his commission of the bombing crime. He was not being paid and did not claim to have been paid for committing the crime of agreeing with others to commit future bombings. Even if the jury's verdict is not invalidated by the perjured evidence which led to it, Petitioner Halpenny's alleged action related to the crime of bombing the building, not the crime of conspiracy to bomb in the future.

Hence it is submitted that though it is easy to assume that one who appears after commission of a crime and makes payment for it is necessarily guilty of the crime itself, the sound administration of criminal justice would be benefitted by this Court's rational demonstration that no matter how socially contemptible conduct may be, such conduct cannot render one

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[7] The Government proved one additional bombing that occurred on July 10, 1971, after the conspiracy was charged to have come to an end. However, though Dickson claimed that Gallahan wanted Hood's automobile bombed because of some internal dispute in Chattanooga Local No. 515, Petitioner Halpenny gave the facts of the dispute, subject to corroboration or refutation by checking joint grievance committee records, and it must be recognized by anyone having competent knowledge of labor law that Hood's dispute was with Atlanta Local No. 728, not with Petitioner Halpenny's Local. Rawlings specifically testified that this was a bombing unrelated to union affairs—"That was for Jim Gallahan—that was just a personal feud?—Personal feud.—Had nothing to do with the Teamsters?—No, that was just personal." (6 Cir. App., p. 103).

guilty of the crime of conspiracy if analytical consideration of the Government's evidence establishes that the action did not occur until after the conspiracy had achieved its objectives.

The protection of innocent citizens requires that prosecutions for criminal conspiracy be kept within the bounds of the crime's statutory definition unless Congress shall modify that definition or that of one of the related crimes under which non-actors are rendered criminally liable. Prosecutions for this crime are notoriously suited to the unfair abuse of citizens, and erroneous presumptions, as condemned by this Court in *Bollenbach, supra* (326 U.S., at pp. 614-615), may too easily be applied where they have no proper application unless this Court shall act to keep conspiracy prosecutions within their proper bounds. The automatic application of the habit of *stare decisis* will inevitably expand this crime to a scope that could endanger the liberty of all citizens, just as the Court of Star Chamber originated the crime by an irrational expansion of an ancient English statute. See III Holdsworth, A History of English Law, 400-405 (7th ed. 1923).

The Fifth Question raises issues regarding errors on the trial whose impropriety and prejudicial effect are so clear as to need little amplification.

The prime objection which can be made in principle to conspiracy prosecutions of a group of people is that such prosecutions permit the introductions of evidence which would not even be admissible in separate criminal prosecutions for the substantive crimes that were the objects of the conspiracy. As this Court held in *Krulewitch v. United States*, 336 U.S. 440, 442, hearsay statements are not overt acts unless the making of the statements furthers the purposes of the conspiracy. It is axiomatic it is the function of the Court, not the jury, to rule upon the admissibility of evidence. When courts charge juries that they may consider hearsay statements only if they find that a

conspiracy has been proven and then only if the statement was made in furtherance of the conspiracy, then the court permits the jury to rule upon admissibility. The proposition that the jury can erase incriminating hearsay from its mind is a vain one.

Whenever the utterance of a hearsay statement itself furthered the accomplishment of the substantive crimes whose commission is the aim of the conspiracy, a prosecuting attorney can demonstrate to the court why such utterances actually furthered the objects of the conspiracy. Such statements by counsel can be made to the Court out of the presence of the jury and can even make reference to anticipated evidence not yet introduced. But to permit the jury to determine the issue of admissibility—even under the most correct instructions—is to permit jurors to perform a function which the law must assign only to judges whenever possible.

To prevent the illicit expansion of the institution of criminal conspiracy prosecutions from their technical legal conceptualization into a new crime of having tangential knowledge and making idle comments without ever being actually involved either in conspiring or in carrying out conspiratorial plans, it is needful that this Court analyze anew the crime of conspiracy and the questions raised by this case.

Finally, the comments of the United States Attorney verged upon assurance that the Government had satisfied itself of the truth of the testimony of those felons now protected by it. Comments of this tenor were condemned by this Court in *Berger v. United States*, 295 U.S. 86, and it cannot be doubted that these comments by an officer of the United States must have had great weight in the process by which the jury reached its verdict, because neither the jury nor any court can reconcile the testimony the Government brought before the jury.

In conclusion, the Petitioners did not assign as error herein the decision of the learned Court of Appeals not to write an

opinion in the case. However, the following comments have bearing upon the second prayer made below, and are comments Petitioners believe this honorable Court should consider.

In discretionary jurisdictional areas, such as those involving applications for such writs as *certiorari* and *mandamus*, it is impossible for courts to write opinions in all such cases, and the absence of an opinion therein does not affect confidence in the judicial system because some court will have expressly treated the merits of the questions. But on direct appeals from criminal convictions, it is, in the words of this Court's Rule 19, in the "accepted and usual course of judicial proceedings," that in appeals of right, opinions are written to enunciate the appellate court's reasons and reasoning by which it arrived at its conclusion.

When most serious contentions of reversible trial court actions have been made in a vigorous manner with every endeavor to give what counsel clearly believes to be a rational demonstration that a trial court's actions were improper, it is respectfully submitted that tradition and the usual course of proceedings require the intermediate appellate court to meet and dispose of the issues with a written opinion. Clients who believe in their innocence have a tendency to view as unanswerable arguments made in their behalf, and when such laymen read a judicial opinion or order that makes no endeavor to explain why serious arguments have been held incorrect by the reviewing court, lay clients must entertain the conclusion that the appellate court *could not* answer the arguments or that it gave scant or inadequate consideration to the case of utmost importance to the people involved. The absence of a written opinion makes immeasurably more burdensome to this Court the discharge of its duty to consider *certiorari* petitions, and the ever-increasing habit of appellate courts in failing to enunciate reasons for their decisions will have a

natural tendency to weaken confidence in the judicial department of any government in the long run.

There is no object of government more fundamental and important than the preservation of confidence in a nation's judicial procedures. Once this confidence is sufficiently eroded, the powerful but fragile fabric of government itself can become too weak to sustain that degree of public confidence essential to the continued maintenance of sound government with powers adequate to accomplish its legitimate ends.

Wherefore, Petitioners most respectfully pray:

1st: That the writ of *certiorari* issue and that this Court consider the questions raised thereby on their merits.

2nd: In the alternative, that the writ issue and, if the Court considers the questions of insufficient importance to merit its full consideration, the judgment of the learned Court of Appeals be vacated and the case remanded with instructions that the issues raised by these petitioners' consolidated appeal be considered on their merits, in the light of the authorities herein cited, and that the Honorable Court of Appeals in arriving at its final decision, enunciate the reasons therefor in its opinion.

Respectfully submitted

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APPENDIX

COURT OF APPEALS ORDER DENYING REHEARING

Nos. 74-2356 and 2357

United States Court of Appeals
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,

v.

No. 74-2356

Ota T. Thomas,
Defendant-Appellant.

United States of America,
Plaintiff-Appellee,

v.

No. 74-2357

David L. Halpenny,
Defendant-Appellant.

Order

(Filed August 8, 1975)

Before: Weick and Engel, Circuit Judges and Cecil, Senior Circuit Judge

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendants-appel-

lants has been referred to the panel which heard the original appeal. Upon consideration of said petition, the court concludes that it is without merit.

Accordingly, the petition for rehearing is hereby denied.

Entered by Order of the Court

/s/ JOHN P. HELMAN
Clerk

DISTRICT COURT ORDER OVERRULING MOTION FOR NEW TRIAL

In the United States District Court for the
Eastern District of Tennessee
Southern Division

United States of America vs. James Edward Gallahan, Francina Foster Gallahan, Robert Eugene Smith, Ota T. Thomas, David L. Halpenny.	CR-1-74-44

Order on Motion for New Trial

(Filed July 9, 1974)

This case is presently before the Court upon a motion for a new trial or for judgment of acquittal filed in behalf of the defendants Thomas and Halpenny and upon a motion for permission to interview jurors on behalf of the said defendants.

The defendants were tried and convicted, along with three co-defendants, on charges of conspiracy and aiding and abetting in the use of explosives for the destruction of property used in a business affecting interstate commerce. The defendants were each convicted upon the conspiracy count. In addition, the defendant Thomas was convicted upon a substantive count of aiding and abetting and acquitted upon a further substantive count of aiding and abetting.

It is the contention of both defendants that the acquittal of the defendant Thomas upon the third count of the indictment is inconsistent with the conviction of both defendants upon the conspiracy count and with the conviction of the defendant Thomas upon Count Two.

Having reviewed the record, the Court, however, finds no inconsistency in the verdict. Rather, it appears that the jury carefully weighed the evidence and accredited the testimony of the government witnesses with respect to all defendants and upon all counts other than the charge in the third count that the defendant Thomas aided in the bombing of the Amos & Andy Buick Company upon June 13, 1971. On that count it it apparent that the testimony regarding the hospitalization of the defendant Thomas during the month of June was sufficient to cause the jury to acquit him with respect to the charges in that count.

Taking up the defendants' motion to be allowed to interview jurors, there is a total absence of any showing of irregularities in the impanelling or conduct of the jury. The jury was subjected to a careful voir dire by counsel for defendants at the time that they were impanelled. At the request of counsel, they were further voir dired by the Court at the conclusion of the trial regarding their conduct during the course of the trial and regarding their observance of the Court's instructions. Accordingly, the Court is of the opinion that the jury should not be recalled and further interrogated regarding their conduct and deliberations in this case.

It is accordingly Ordered that the motion for new trial and/or for judgment of acquittal filed on behalf of the defendants Ota T. Thomas and David L. Halpenny, be and the same are hereby denied.

It is Further Ordered that the motion of the said defendants for further interrogation of the jury likewise be denied.

Enter:

/s/ (Illegible) W. WILSON
United States District Judge

COURT OF APPEALS ORDER DENYING REHEARING

Nos. 74-2356 and 2357

United States Court of Appeals
For the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v. No. 74-2356

Ota T. Thomas,
Defendant-Appellant.

United States of America,
Plaintiff-Appellee,
v. No. 74-2357

David L. Halpenny,
Defendant-Appellant.

Order

(Filed August 8, 1975)

Before: Weick and Engel, Circuit Judges and Cecil, Senior Circuit Judge

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein by the defendants-appellants has been referred to the panel which heard the original appeal.

Upon consideration of said petition, the court concludes that it is without merit.

Accordingly, the petition for rehearing is hereby denied.

Entered by Order of the Court

/s/ JOHN P. HELMAN
Clerk

COURT OF APPEALS ORDER AFFIRMING JUDGMENT

Nos. 74-2354, 2355, 2356 and 2357

United States Court of Appeals
for the Sixth Circuit

United States of America,
Plaintiff-Appellee,
v.

James Edward Gallahan (74-2354), Francina Foster Gallahan (74-2355), Ota T. Thomas (74-2356), David L. Halpenny (74-2357),
Defendants-Appellants.

Order

(Filed July 1, 1975)

Before: Weick and Engel, Circuit Judges and Cecil, Senior Circuit Judge

The four above captioned appeals were consolidated for hearing before a panel of this court and result from the convictions of appellants in a jury trial in the United States District Court for the Eastern District of Tennessee of conspiracy to commit certain offenses against the laws of the United States pertaining to the illicit and unlawful manufacture, possession and use of destructive devices and explosives, 26 U.S.C. §§ 5861 and 5871; 18 U.S.C. §§ 371 and 844, and of related substantive counts

charging an alleged malicious attempt to damage by use of an explosive the Amos and Andy Buick showroom in Chattanooga on April 13, 1971, and the malicious damage of the same building by means of an explosive on June 13, 1971.

Appellants James Edward Gallahan and Francina Foster Gallahan were convicted on all three counts and in their appeals, they allege that there was insufficient evidence to sustain the verdicts returned against them. Appellants also allege that the district court erred in overruling their motion for a bill of particulars and in allowing the government to present proofs of other bombings which were not specifically described in the indictment and in the overt acts appended to the conspiracy charge. In that connection, appellants urge as well that the action of the court in sustaining their timely objection to certain questions concerning the bombings of a union hall was inadequate to protect them from the prejudicial effects of the question upon the jury, and that the trial court erred in denying their motion for a mistrial.

Appellant Thomas was convicted on counts 1 and 2 and acquitted on count 3. Appellant Halpenny was convicted on count 1, the only count with which he was charged. In their appeals it is claimed that the district court erred in failing to direct a verdict in favor of Halpenny on the conspiracy count and that there was insufficient evidence to support the conviction of Thomas on the counts on which he was convicted. These defendants also assert that the court erred in denying their motion for a new trial and in refusing to permit defense interrogation of the jury.

Further, the defendants Halpenny and Thomas claim that the prosecution engaged in improper conduct by the use of perjured, unreliable, and inconsistent testimony to obtain appellants' convictions.

Finding no merit in any of these contentions,

It Is Ordered that the judgments in each of the above described appeals be and they are hereby affirmed.

Entered by Order of the Court

JOHN P. HEHMAN, Clerk
/s/ By GRACE KELLER
GRACE KELLER
Chief Deputy

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18 U.S. CODE § 844

§ 844.

(a) Any person who violates subsections (a) through (i) of section 842 of this chapter shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

(b) Any person who violates any other provision of section 842 of this chapter shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Any explosive materials involved or used or intended to be used in any violation of the provisions of this chapter or any other rule or regulation promulgated thereunder or any violation of any criminal law of the United States shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

(e) Whoever, through the use of the mail, telephone, telegraph, or other instrument of commerce, willfully makes any

threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of an explosive shall be imprisoned for not more than five years or fined not more than $5,000, or both.

(f) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other personal or real property in whole or in part owned, possessed, or used by, or leased to, the United States, any department or agency thereof, or any institution or organization receiving Federal financial assistance shall be imprisoned for not more than ten years, or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years, or fined not more than $20,000, or both; and if death results shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

(g) Whoever possesses an explosive in any building in whole or in part owned, possessed, or used by, or leased to, the United States or any department or agency thereof, except with the written consent of the agency, department, or other person responsible for the management of such building, shall be imprisoned for not more than one year, or fined not more than $1,000, or both.

(h) Whoever—

(1) uses an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive unlawfully during the commission of any felony which may be prosecuted in a court of the United States,

shall be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than twenty-five years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

(j) For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section, the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.
[1970 U.S. Code, pp. 4252-4253]

26 U.S. CODE CHAPTER 53

§ 5801.

On first engaging in business and thereafter on or before the first day of July of each year, every importer, manufacturer, and dealer in firearms shall pay a special (occupational) tax for each place of business at the following rates:

(1) Importers.—$500 a year or fraction thereof;

(2) Manufacturers.—$500 a year or fraction thereof;

(3) Dealers.—$200 a year or fraction thereof.

Except an importer, manufacturer, or dealer who imports, manufactures, or deals in only weapons classified as "any other weapon" under section 5845(e), shall pay a special (occupational) tax for each place of business at the following rates: Importers, $25 a year or fraction thereof; manufacturers, $25 a year or fraction thereof; dealers, $10 a year or fraction thereof.

§ 5802.

On first engaging in business and thereafter on or before the first day of July of each year, each importer, manufacturer, and dealer in firearms shall register with the Secretary or his delegate in each internal revenue district in which such business is to be carried on, his name, including any trade name, and the address of each location in the district where he will conduct such business. Where there is a change during the taxable year in the location of, or the trade name used in, such business, the importer, manufacturer, or dealer shall file an application with the Secretary or his delegate to amend his registration. Firearms operations of an importer, manufacturer, or dealer may not be commenced at the new location or under a new trade name prior to approval by the Secretary or his delegate of the application.

§ 5811.

(a) Rate.—There shall be levied, collected, and paid on firearms transferred a tax at the rate of $200 for each firearm transferred, except, the transfer tax on any firearm classified as any other weapon under section 5845(e) shall be at the rate of $5 for each such firearm transferred.

(b) By whom paid.—The tax imposed by subsection (a) of this section shall be paid by the transferor.

(c) Payment.—The tax imposed by subsection (a) of this section shall be payable by the appropriate stamps prescribed for payment by the Secretary or his delegate.

§ 5812.

(a) Application.—A firearm shall not be transferred unless (1) the transferor of the firearm has filed with the Secretary or his delegate a written application, in duplicate, for the transfer and registration of the firearm to the transferee on the application form prescribed by the Secretary or his delegate; (2) any tax payable on the transfer is paid as evidenced by the proper stamp affixed to the original application form; (3) the transferee is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; (4) the transferor of the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; (5) the firearm is identified in the application form in such manner as the Secretary or his delegate may by regulations prescribe; and (6) the application form shows that the Secretary or his delegate has approved the transfer and the registration of the firearm to the transferee. Applications shall be denied if the transfer, receipt, or possession of the firearm would place the transferee in violation of law.

(b) Transfer of possession.—The transferee of a firearm shall not take possession of the firearm unless the Secretary or his delegate has approved the transfer and registration of the firearm to the transferee as required by subsection (a) of this section.

* * * * * * *

§ 5813.

(a) Affixing.—The stamps provided for in section 5811(c) (1) shall be affixed to the order for such firearm, provided for in section 5814.

§ 5814.

(a) General requirements.—It shall be unlawful for any person to transfer a firearm except in pursuance of a written order from the person seeking to obtain such article, on an application form issued in blank duplicate for that purpose by the Secretary or his delegate. Such order shall identify the applicant by such means of identification as may be prescribed by regulations under this chapter: *Provided*, That, if the applicant is an individual, such identification shall include fingerprints and a photograph thereof.

(b) Contents of order form.—Every person so transferring a firearm shall set forth in each copy of such order the manufacturer's number or other mark identifying such firearm, and shall forward a copy of such order to the Secretary or his delegate. The original thereof, with stamp affixed, shall be returned to the applicant.

(c) Exemption in case of registered importers, manufacturers, and dealers.—Importers, manufacturers, and dealers who have registered and paid the tax as provided for in this chapter shall not be required to conform to the provisions of this section with respect to transactions in firearms with dealers or manufacturers

if such dealers or manufacturers have registered and have paid such tax, but shall keep such records and make such reports regarding such transactions as may be prescribed by regulations under this chapter.

(d) Supply.—The Secretary or his delegate shall cause suitable forms to be prepared for the purposes of subsection (a), and shall cause the same to be distributed to officers designated by him.

§ 5821.

(a) Rate.—There shall be levied, collected, and paid upon the making of a firearm a tax rate at the rate of $200 for each firearm made.

(b) By whom paid.—The tax imposed by subsection (a) of this section shall be paid by the person making the firearm.

(c) Payment.—The tax imposed by subsection (a) of this section shall be payable by stamp prescribed for payment by the Secretary or his delegate.

§ 5822

No person shall make a firearm unless he has (a) filed with the Secretary or his delegate a written application, in duplicate, to make and register the firearm on the form prescribed by the Secretary or his delegate; (b) paid any tax payable on the making and such payment is evidenced by the proper stamp affixed to the original application form; (c) identified the firearm to be made in the application form in such manner as the Secretary or his delegate may by regulations prescribe; (d) identified himself in the application form in such manner as the Secretary or his delegate may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; and (e) obtained the approval of the

Secretary or his delegate to make and register the firearm and the application form shows such approval. Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law.

§ 5841

(a) **Central registry.**—The Secretary or his delegate shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include—

(1) identification of the firearm;

(2) date of registration; and

(3) identification and address of person entitled to possession of the firearm.

(b) By whom registered.—Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) How registered.—Each manufacturer shall notify the Secretary or his delegate of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a fiream, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) Firearms registered on effective date of this act.—A person shown as possessing a firearm by the records maintained by the Secretary or his delegate pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.

(e) Proof of registration.—A person possessing a firearm registered as required by this section shall retain proof of registration which shall be made available to the Secretary or his delegate upon request.

§ 5842. Identification of firearms

(a) Identification of firearms other than destructive devices.—Each manufacturer and importer and anyone making a firearm shall identify each firearm, other than a destructive device, manufactured, imported, or made by a serial number which may not be readily removed, obliterated, or altered, the name of the manufacturer, importer, or maker, and such other identification as the Secretary or his delegate may by regulations prescribe.

(b) Firearms without serial number.—Any person who possesses a firearm, other than a destructive device, which does not bear the serial number and other information required by subsection (a) of this section shall identify the firearm with a serial number assigned by the Secretary or his delegate and any other information the Secretary or his delegate may by regulations prescribe.

(c) Identification of destructive device.—Any firearm classified as a destructive device shall be identified in such manner as the Secretary or his delegate may by regulations prescribe.

§ 5843. Records and returns

Importers, manufacturers, and dealers shall keep such records of, and render such returns in relation to, the importation, manufacture, making, receipt, and sale, or other disposition, of firearms as the Secretary or his delegate may by regulations prescribe.

§5884. Importation

No firearm shall be imported or brought into the United States or any territory under its control or jurisdiction unless the importer establishes, under regulations as may be prescribed by the Secretary or his delegate, that the firearm to be imported or brought in is—

(1) being imported or brought in for the use of the United States or any department, independent establishment, or agency thereof or any State or possession or any political subdivision thereof; or

(2) being imported or brought in for scientific or research purposes; or

(3) being imported or brought in solely for testing or use as a model by a registered manufacturer or solely for use as a sample by a registered importer or registered dealer;

except that, the Secretary or his delegate may permit the conditional importation or bringing in of a firearm for examination and testing in connection with classifying the firearm.

§ 5845. Definitions

For the purpose of this chapter—

(a) Firearm.—The term "firearm" means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a

weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) a muffler or silencer for any firearm whether or not such firearm is included within this definition; and (8) a destructive device. The term "firearm" shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary or his delegate finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector's item and is not likely to be used as a weapon.

(b) Machinegun.—The term "machinegun" means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any combination of parts designed and intended for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

(c) Rifle.—The term "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

(d) Shotgun.—The term "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of projectiles (ball shot) or a single projectile for each pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed shotgun shell.

(e) Any other weapon.—The term "any other weapon" means any weapon or device capable of being concealed on the person from which a shot can be discharged through the energy of an explosive, a pistol or revolver having a barrel with a smooth bore designed or redesigned to fire a fixed shotgun shell, weapons with combination shotgun and rifle barrels 12 inches or more, less than 18 inches in length, from which only a single discharge can be made from either barrel without manual reloading, and shall include any such weapon which may be readily restored to fire. Such term shall not include a pistol or a revolver having a rifled bore, or rifled bores, or weapons designed, made, or intended to be fired from the shoulder and not capable of firing fixed ammunition.

(f) Destructive device.—The term "destructive device" means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellent charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary or his delegate finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in con-

verting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term "destructive device" shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of sections 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary of the Treasury or his delegate finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting purposes.

(g) Antique firearm.—The term "antique firearm" means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

(h) Unserviceable firearm.—The term "unserviceable firearm" means a firearm which is incapable of discharging a shot by means of an explosive and incapable of being readily restored to a firing condition.

(i) Make.—The term "make", and the various derivatives of such word, shall include manufacturing (other than by one qualified to engage in such business under this chapter), putting together, altering, any combination of these, or otherwise producing a firearm.

(j) Transfer.—The term "transfer" and the various derivatives of such word, shall include selling, assigning, pledging, leasing, loaning, giving away, or otherwise disposing of.

(k) Dealer.—The term "dealer" means any person, not a manufacturer or importer, engaged in the business of selling, renting, leasing, or loaning firearms and shall include pawnbrokers who accept firearms as collateral for loans.

(l) Importer.—The term "importer" means any person who is engaged in the business of importing or bringing firearms into the United States.

(m) Manufacturer.—The term "manufacturer" means any person who is engaged in the business of manufacturing firearms.

§ 5846. Other laws applicable

All provisions of law relating to special taxes imposed by chapter 51 and to engraving, issuance, sale, accountability, cancellation, and distribution of stamps for tax payment shall, insofar as not inconsistent with the provisions of this chapter, be applicable with respect to the taxes imposed by sections 5801, 5811 and 5821.

§ 5847. Effect on other laws

Nothing in this chapter shall be construed as modifying or affecting the requirements of section 414 of the Mutual Security Act of 1954, as amended, with respect to the manufacture, exportation, and importation of arms, ammunition, and implements of war.

§ 5848. Restrictive use of information

(a) General rule.—No information or evidence obtained from an application, registration, or records required to be submitted or retained by a natural person in order to comply with any provision of this chapter or regulations issued thereunder, shall, except as provided in subsection (b) of this section, be used, directly or indirectly, as evidence against that person in a criminal proceeding with respect to a violation of law occurring prior to or concurrently with the filing of the application or registration, or the compiling of the records containing the information or evidence.

(b) Furnishing false information.—Subsection (a) of this section shall not preclude the use of any such information or evidence in a prosecution or other action under any applicable provision of law with respect to the furnishing of false information.

§ 5849. Citation of chapter

This chapter may be cited as the "National Firearms Act" and any reference in any other provision of law to the "National Firearms Act" shall be held to refer to the provisions of this chapter.

§ 5851. Special (occupational) tax exemption

(a) Business with United States.—Any person required to pay special (occupational) tax under section 5801 shall be relieved from payment of that tax if he establishes to the satisfaction of the Secretary or his delegate that his business is conducted exclusively with, or on behalf of, the United States or any department, independent establishment, or agency thereof. The Secretary or his delegate may relieve any person manufacturing firearms for, or on behalf of, the United States from compliance

with any provision of this chapter in the conduct of such business.

(b) Application.—The exemption provided for in subsection (a) of this section may be obtained by filing with the Secretary or his delegate an application on such form and containing such information as may by regulations be prescribed. The exemptions must thereafter be renewed on or before July 1 of each year. Approval of the application by the Secretary or his delegate shall entitle the applicant to the exemptions stated on the approved application.

§ 5852. General transfer and making tax exemption

(a) Transfer.—Any firearm may be transferred to the United States or any department, independent establishment, or agency thereof, without payment of the transfer tax imposed by section 5811.

(b) Making by a person other than a qualified manufacturer.—Any firearm may be made by, or on behalf of, the United States, or any department, independent establishment, or agency thereof, without payment of the making tax imposed by section 5821.

(c) Making by a qualified manufacturer.—A manufacturer qualified under this chapter to engage in such business may make the type of firearm which he is qualified to manufacture without payment of the making tax imposed by section 5821.

(d) Transfers between special (occupational) taxpayers.—A firearm registered to a person qualified under this chapter to engage in business as an importer, manufacturer, or dealer may be transferred by that person without payment of the transfer tax imposed by section 5811 to any other person qualified under this chapter to manufacture, import, or deal in that type of firearm.

(e) Unserviceable firearm.—An unserviceable firearm may be transferred as a curio or ornament without payment of the transfer tax imposed by section 5811, under such requirements as the Secretary or his delegate may by regulations prescribe.

(f) Right to exemption.—No firearm may be transferred or made exempt from tax under the provisions of this section unless the transfer or making is performed pursuant to an application in such form and manner as the Secretary or his delegate may by regulations prescribe.

§ 5853. Transfer and making tax exemption available to certain government entities

(a) Transfer.—A firearm may be transferred without the payment of the transfer tax imposed by section 5811 to any State, possession of the United States, any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations.

(b) Making.—A firearm may be made without payment of the making tax imposed by section 5821 by, or on behalf of, any State, or possession of the United States, any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations.

(c) Right to exemption.—No firearm may be transferred or made exempt from tax under this section unless the transfer or making is performed pursuant to an application in such form and manner as the Secretary or his delegate may by regulations prescribe.

(b) Making by a person other than a qualified manufacturer.—Any firearm may be made by, or on behalf of, the United States, or any department, independent establishment, or agency thereof, without payment of the making tax imposed by section 5821.

(c) Making by a qualified manufacturer.—A manufacturer qualified under this chapter to engage in such business may make the type of firearm which he is qualified to manufacture without payment of the making tax imposed by section 5821.

(d) Transfers between special (occupational) taxpayers.—A firearm registered to a person qualified under this chapter to engage in business as an importer, manufacturer, or dealer may be transferred by that person without payment of the transfer tax imposed by section 5811 to any other person qualified under this chapter to manufacture, import, or deal in that type of firearm.

(e) Unserviceable firearm.—An unserviceable firearm may be transferred as a curio or ornament without payment of the transfer tax imposed by section 5811, under such requirements as the Secretary or his delegate may by regulations prescribe.

(f) Right to exemption.—No firearm may be transferred or made exempt from tax under the provisions of this section unless the transfer or making is performed pursuant to an application in such form and manner as the Secretary or his delegate may by regulations prescribe.

§ 5853. Transfer and making tax exemption available to certain governmental entities.

(a) Transfer.—A firearm may be transferred without the payment of the transfer tax imposed by section 5811 to any State, possession of the United States, any political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations.

(b) Making.—A firearm may be made without payment of the making tax imposed by section 5821 by, or on behalf of, any State, or possession of the United States, and political subdivision thereof, or any official police organization of such a government entity engaged in criminal investigations.

(c) Right to exemption.—No firearm may be transferred or made exempt from tax under this section unless the transfer or making is performed pursuant to an application in such form and manner as the Secretary or his delegate may by regulations prescribe.

§ 5854. Exportation of firearms exempt from transfer tax

A firearm may be exported without payment of the transfer tax imposed under section 5811 provided that proof of the exportation is furnished in such form and manner as the Secretary or his delegate may by regulations prescribe.

§ 5861. Prohibited acts

It shall be unlawful for any person—

(a) to engage in business as a manufacturer or importer of, or dealer in, firearms without having paid the special (occupational) tax required by section 5801 for his business or having registered as required by section 5802; or

(b) to receive or possess a firearm transferred to him in violation of the provisions of this chapter; or

(c) to receive or possess a firearm made in violation of the provisions of this chapter; or

(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

(e) to transfer a firearm in violation of the provisions of this chapter; or

(f) to make a firearm in violation of the provisions of this chapter; or

(g) to obliterate, remove, change, or alter the serial number or other identification of a firearm required by this chapter. or

(h) to receive or possess a firearm having the serial number or other identification required by this chapter obliterated, removed, changed, or altered; or

(i) to receive or possess a firearm which is not identified by a serial number as required by this chapter; or

(j) to transport, deliver, or receive any firearm by interstate commerce which has not been registered as required by this chapter; or

(k) to receive or possess a firearm which has been imported or brought into the United States in violation of section 5844; or

(l) to make, or cause the making of, a false entry on any application, return, or record required by this chapter, knowing such entry to be false.

§ 5862. Forfeitures

(a) Laws applicable.—Any firearm involved in any violation of the provisions of this chapter or any regulation promulgated thereunder shall be subject to seizure and forfeiture, and (except as provided in subsection (b)) all the provisions of internal revenue laws relating to searches, seizures, and forfeiture of unstamped articles are extended to and made to apply to the articles taxed under this chapter, and the persons to whom this chapter applies.

(b) Disposal.—In the case of the forfeiture of any firearm by reason of a violation of this chapter: No notice of public sale

shall be required; no such firearm shall be sold at public sale; if such firearm is forfeited for a violation of this chapter and there is no remission or mitigation of forfeiture thereof, it shall be delivered by the Secretary or his delegate to the Administrator of General Services, General Services Administration, who may order such firearm destroyed or may sell it to any State, Territory, or possession, or political subdivision thereof, or the District of Columbia, or at the request of the Secretary or his delegate may authorize its retention for official use of the Treasury Department, or may transfer it without charge to any executive department or independent establishment of the Government for use by it.

§ 5871. Penalties.

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both, and shall become elegible for parole as the Board of Parole shall determine.

§ 5872. Forfeitures

(a) Laws applicable.—Any firearm involved in any violation of the provisions of this chapter shall be subject to seizure and forfeiture, and (except as provided in subsection (b)) all the provisions of internal revenue laws relating to searches, seizures, and forfeitures or unstamped articles are extended to and made to apply to the articles taxed under this chapter, and the persons to whom this chapter applies.

(b) Disposal.—In the case of the forfeiture of any firearm by reason of a violation of this chapter, no notice of public sale shall be required; no such firearm shall be sold at public sale;

if such firearm is forfeited for a violation of this chapter and there is no remission or mitigation of forfeiture thereof, it shall be delivered by the Secretary or his delegate to the Administrator of General Services, General Services Administration, who may order such firearm destroyed or may sell it to any State, or possession, or political subdivision thereof, or at the request of the Secretary or his delegate, may authorize its retention for official use of the Treasury Department, or may transfer it without charge to any executive department or independent establishment of the Government for use by it.

[1970 U.S. CODE, pp. 7180-7188]

DISTRICT COURT RULE ON INTERVIEWING JURORS

In the United States District Court
For the Eastern District of Tennessee

Filed 10 day of Nov. 1969
Ent'd Order Bk 2 p 4
Karl D. Saulpaw, Jr., Clerk
By /s/ Bertha Morgan
Dep. Clerk

Order

This Court has had an unwritten rule for many years to the effect that lawyers shall not talk to jurors about what took place in the jury room that led to a verdict, without first obtaining the consent of the presiding judge.

It has recently come to the Court's attention that on rare occasions some of the lawyers have approached certain jurors for information about the deliberations of the jury in the jury room.

In order that all lawyers may have actual notice of the Court's rule on this subject, it is Ordered that hereafter no attorney, or his representative, shall approach, or cause to be approached, a juror in an effort to find out what went on

among the jurors in the jury room in arriving at a verdict, without permission of the presiding judge.

/s/ ROBERT L. TAYLOR
United States District Judge

/s/ FRANK W. WILSON
United States District Judge

/s/ C. G. NEESE
United States District Judge

[Unofficially published, **Tennessee Rules of Court 1970**, p. 227 (West Pub. Co., 1970)]

Supreme Court, U. S.
FILED
NOV 17 1975
MICHAEL RODAK, JR., CLERK

No. 75-335

In the Supreme Court of the United States

OCTOBER TERM, 1975

DAVID L. HALPENNY AND OTA T. THOMAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-335

DAVID L. HALPENNY AND OTA T. THOMAS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the evidence of their guilt was insufficient and that certain evidence was improperly admitted, that the government's closing argument was improper, and that the trial court erroneously refused to allow petitioners' attorney to interview the jury after the trial.

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners were convicted of conspiring to make, possess and use destructive devices, in violation of 18 U.S.C. 371 and 844 and 26 U.S.C. 5861 and 5871. Petitioner Thomas was also convicted of attempted destruction of property with a destructive device, in violation of 18

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U.S.C. 2 and 844.[1] Petitioner Halpenny was sentenced to four years' imprisonment. Petitioner Thomas was sentenced to concurrent terms of four years' imprisonment on the conspiracy count and six years' imprisonment on the attempt count. The court of appeals affirmed (Pet. A–8 to A–10).

The evidence at trial showed that from approximately April 7, 1971, through August 31, 1971, striking members of Local 515 of the Teamsters Union manned picket lines at the showroom of the Amos & Andy Buick Company in Chattanooga, Tennessee (Tr. 15–16). During this time, petitioner Halpenny, president of Local 515, conducted negotiations on behalf of the union with the management of Amos & Andy (Tr. 16). In April 1971, petitioner Thomas and another of Local 515's business agents told Jack Rawlings that "something had to be done about the strike" at Amos & Andy and that he should "get Sydney Dickson to throw a bomb down there."[2] Thomas also told Rawlings where to find some dynamite (Tr. 37–39). Dickson and Rawlings made a bomb and, early in the morning of April 13, 1971, placed it by the side door of the automobile dealership. Although the device failed to detonate, Rawlings

[1] Petitioner Thomas was acquitted on a third count charging destruction of property with a destructive device. Petitioner Halpenny was tried for conspiracy only. Co-defendants James Gallahan, Francina Gallahan and Robert Smith were tried with petitioners and convicted of conspiracy and related substantive offenses. Unindicted co-conspirators Jack Rawlings and Sydney Dickson testified for the government under grants of immunity.

[2] Dickson and Rawlings were members of the Teamsters Union but were not employees of Amos & Andy (Tr. 35, 207–209).

and Dickson were paid fifty dollars for the attempt by petitioner Thomas (Tr. 40–41, 210–211, 215).

In June 1971, petitioner Halpenny told Dickson that the strike at Amos & Andy was still not going well and that something further would have to be done (Tr. 220–221, 329). At about the same time, petitioner Thomas instructed Rawlings to "blow the place up" (Tr. 44). Rawlings thereupon had Dickson make another bomb, which Rawlings threw through the front window of the Amos & Andy showroom on the night of June 13, 1971 (Tr. 17, 45). The bomb exploded, causing substantial damage to the building and to display cars (Tr. 18).

A day or two later, Rawlings told Dickson that payment for the bombing would be made by petitioner Halpenny (Tr. 223). Subsequently, Rawlings and his girl friend drove to the union hall, and petitioner Halpenny paid Rawlings $250 for the successful bombing. Halpenny informed Rawlings at that time that if the June 13 bombing did not produce a settlement ending the strike, the next bombing would be worth $500 (Tr. 47, 360–361).[3]

[3] Rawlings and his girl friend both testified that immediately before the meeting with Halpenny they had met Thomas at a doughnut shop. Thomas had told Rawlings at that time that he should go to the union hall and that he would be paid there for the bombing by petitioner Halpenny (Tr. 46, 358–359). They further testified that their meetings with Thomas and Halpenny had taken place a few days after the successful bombing on June 13, 1971 (Tr. 46, 383). A physician testified, however, that Thomas was hospitalized for intestinal surgery from June 6, 1971, until June 30, 1971 (Tr. 669). In his closing argument, the prosecutor suggested that the government's witnesses had been honestly mistaken about the dates of the meetings (Tr. 861).

1. Petitioners challenge the evidence introduced by the government at trial on several grounds: (a) they object to an asserted lack of corroboration of the testimony of the government's witnesses, who they allege had a motive to frame them, and criticize the government for failure to refute their alibis; (b) they accuse the government of knowingly using perjured testimony; (c) they attack the method by which hearsay statements of co-conspirators were introduced; and, finally, (d) petitioner Halpenny contends that there was no evidence of his participation in the conspiracy.

a. Petitioners' contentions (Pet. 23–26) concerning an asserted absence of corroboration of the testimony of the government's witnesses constitutes nothing more than a challenge to the credibility of those witnesses. The government's witnesses were subjected to extensive cross-examination, and the judge instructed the jury that the government must prove its case beyond a reasonable doubt (Tr. 970–972). As indicated by the brief discussion above, there was ample evidence at trial from which the jury could have found petitioners guilty as charged. Petitioners have no cause to complain because the jury apparently chose to believe the government's witnesses.[4]

b. The record does not support petitioners' contention (Pet. 20–23) that one or more of the government's witnesses committed perjury at trial, or

[4] Petitioner Thomas' alibi for the bombing attempted on April 13 needed no refutation, since it did not cover the material events that had occurred in the early morning on that date (Tr. 40–41).

that the government knowingly permitted perjured testimony to go uncorrected. Although there were some inconsistencies in the testimony of the government's witnesses, nothing in the record supports petitioners' allegations that those inconsistencies were the result of willful lying rather than faulty memories.

c. Petitioners' contention (Pet. 32–33) that it is the duty of the court to decide *in camera* whether statements of co-conspirators are in furtherance of a conspiracy is without merit. The trial court properly submitted that issue to the jury. See, *e.g., United States* v. *King,* 472 F. 2d 1, 9 (C.A. 9), certiorari denied *sub nom. Butler* v. *United States,* 414 U.S. 864.

d. Petitioner Halpenny argues (Pet. 29–32) that there was no evidence of his participation in the conspiracy charged in the indictment and that his payment for the bombing that occurred on June 13, 1971, could not be used to prove that he was a part of the conspiracy, since the payment was made after the conspiracy had ended. But even if it were assumed that the conspiracy terminated with the successful bombing, Halpenny's payment was admissible to prove his participation in the conspiracy. See *Anderson* v. *United States,* 417 U.S. 211, 218–219; *Lutwak* v. *United States,* 344 U.S. 605, 617–618. Halpenny's argument that the payment was necessarily related to the substantive offense rather than the conspiracy overlooks the fact that the same evidence may be relevant to two separate crimes. *Nye & Nissen* v. *United States,* 336 U.S. 613, 619; *United States* v. *McGowan,* 423 F. 2d 413, 415–417 (C.A. 4).

2. Petitioners' contention (Pet. 33) that the government's closing argument, to which no objections were raised prior to return of the verdicts, was improper is also without merit.

The most important issue in the case was the credibility of the government's witnesses. In his argument, the prosecutor acknowledged that the government's witnesses were not of unblemished character, but he argued that their testimony in this case was credible. Words chosen to make this argument (see Pet. 6–7, 33), such as "[w]e are standing behind what these people said from this witness stand in this trial" (Tr. 852), when taken out of context, belie the true nature of the argument when read as a whole. The government did not personally guarantee the veracity of the testimony against the defendants or rely upon facts not in evidence at the trial,[5] but argued that the testimony was worthy of belief. For example, immediately following the statement quoted above, the prosecutor stated: "We are standing behind that and we contend what they told us was the truth" (Tr. 852). In any event, moreover, the jury was clearly instructed by the court that it was the sole judge of the weight and credibility of the testimony of each witness (Tr. 965–967).

[5] Petitioner Halpenny further contends (Pet. 6–7) that, in stating in his closing argument that there were some discrepancies between the testimony presented to the grand jury and that presented at trial, the prosecutor improperly relied upon facts not in evidence at the trial. But petitioner has failed to suggest how he could have been prejudiced by the government's pointing out a weakness in its case, and we have been unable to perceive a basis for assuming such prejudice.

Petitioner Halpenny also objects (Pet. 7) to the prosecutor's statement during his closing argument that Halpenny had arranged bombings in addition to those specifically charged in the indictment (Tr. 929). Throughout the trial, witnesses testified about such other bombings. The court instructed the jury to consider such bombings only as they might reflect on matters charged in the indictment (*e.g.*, Tr. 48, 49).[6] The prosecutor's theory of the case was that Halpenny had ordered the bombings in question in order to advance the interests of the union and that they revealed Halpenny's intent and *modus operandi* (*e.g.*, Tr. 851, 858, 919–921). Since Halpenny paid for one bombing and stated that the next bombing would be worth more, and since the business agents of the union who had told Rawlings and Dickson what to bomb had been hired by petitioner Halpenny, the statement in question constituted a permissible inference from the evidence establishing the existence of the conspiracy.

3. Petitioners also contend (Pet. 26–28) that the trial court erred in refusing their counsel's request to interview the jurors after the trial, especially concerning publicity that had appeared during the trial.

The court carefully and repeatedly instructed members of the jury not to read or listen to news accounts

[6] The court's instructions in this regard were correct. The other bombings were admissible to prove the defendants' intent and *modus operandi*. See, *e.g.*, *Sears* v. *United States*, 490 F. 2d 150, 152 (C.A. 8), certiorari denied, 417 U.S. 949; *United States* v. *Pennick*, 500 F. 2d 184, 187 (C.A. 10), certiorari denied, 419 U.S. 1051.

of the case (Tr. 202, 470, 581, 937). Before submission of the case to the jury, the court carefully questioned the jurors and received no indication that the court's instructions in this regard had not been followed (Tr. 980–981). In their motion to interview jurors after the trial, petitioners merely alleged that juror misconduct was likely and not remote. Since petitioners offered no specific evidence of misconduct on the part of individual jurors, the court's refusal to permit post-verdict interviews was proper in light of the public's interest in preventing post-trial harassment of jurors. See *United States* v. *Franks,* 511 F.2d 25, 38 (C.A. 6), certiorari denied, No. 74–1281, June 23, 1975; *United States* v. *Dye,* 508 F.2d 1226, 1232 (C.A. 6), certiorari denied, 420 U.S. 974.

Petitioners also attack (Pet. 27–28) the rule in effect in the United States District Court for the Eastern District of Tennessee permitting counsel to interview jurors after the trial only after having obtained the consent of the presiding judge.[1] They argue that such rule is defective because only this Court has rule-making authority. However, 28 U.S.C. 2071 grants all courts established by Congress power to prescribe rules for the conduct of their business. See also Rule 57(a), Fed. R. Crim. P. Furthermore, district courts have a responsibility to protect the integrity of the judicial process by guarding against jury tamper-

[1] Petitioners' suggestion (Pet. 4) that the court framed and announced the rule in the case is incorrect; the rule in question has been in effect, in written form, in the Eastern District of Tennessee since 1969 (Pet. A–33—A–34).

ing, the inhibition of jury deliberations, and jury harassment (see *Miller* v. *United States,* 403 F. 2d 77, 81–82 (C.A. 2)); the rule challenged by petitioners appropriately serves those interests while giving presiding judges the discretion to permit post-verdict interviews of individual jurors whenever justified in individual cases.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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